

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DENNIS ALLEN VOSHELL,

Petitioner,

Case Number 10-11409
Honorable Thomas L. Ludington

v.

SHERRY BURT,

Respondent.

**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING
PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS AND DENYING A
CERTIFICATE OF APPEALABILITY**

On April 8, 2010, Petitioner Dennis Voshell filed a petition for writ of habeas corpus [Dkt. #1], brought under 28 U.S.C. § 2254, challenging the constitutionality of his incarceration in a Michigan prison. Petitioner was sentenced to a term of 50 to 180 months following his plea of guilty in the Roscommon County Circuit Court to a charge of second degree criminal sexual conduct, Mich. Comp. Laws § 750.520c(1)(a). This matter is now before the Court on a report and recommendation [Dkt. #15] issued by Magistrate Judge R. Steven Whalen on March 17, 2011. Judge Whalen recommends denying Petitioner's petition for writ of habeas corpus [Dkt. #1].

More specifically, Judge Whalen notes that Petitioner's petition could be properly dismissed for failure to exhaust the remedies available in state court, but he instead recommends denying Petitioner's petition for lack of merit in all of the issues that have been raised. First, Judge Whalen recommends that Petitioner's claim that he did not understand the consequences of his plea and that he was coerced into pleadings is contradicted by the state court record, including Petitioner's own sworn statements. Second, Judge Whalen recommends that Petitioner's ineffective assistance of

counsel claims are similarly defeated by his own statements on the record, including his acknowledgment that he was satisfied with his counsel's representation. Judge Whalen further recommends that Petitioner has not informed the Michigan courts nor this Court what mitigating evidence he contends his attorney omitted during sentencing. Third, Judge Whalen recommends that Petitioner's allegation of miscalculation of his sentencing guidelines is an issue of state law, not federal law, and is not cognizable on federal habeas review. Fourth, Judge Whalen recommends that Petitioner's claim for cruel and unusual punishment as a result of his sentence is without merit. Petitioner's sentence, which was within both the statutory limits and the sentencing guideline range, is presumptively proportional under state law and under federal law is neither extreme nor grossly disproportionate so as to violate the Eighth Amendment of the Constitution. Fifth, Judge Whalen recommends that even if Petitioner were able to present a free-standing claim of actual innocence, he has not presented any extrinsic evidence to support such a claim and that his pleading guilty and providing a factual basis for the offense under oath are inconsistent with a claim of actual innocence. Finally, Judge Whalen recommends denying a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

As of today's date, no party has filed any objections to the magistrate judge's report and recommendation. A party's decision not to object to the report and recommendation waives any further right to appeal. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, a party's decision not to object to the magistrate judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation [Dkt.

#15] is **ADOPTED**.

It is further **ORDERED** that Petitioner's petition for writ of habeas corpus [Dkt. #1] is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: April 19, 2011

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney of record herein by electronic means and upon Dennis Voshell #264768, at Parnall Correctional Facility, 1780 E. Parnall, Jackson, MI 49201 by first class U.S. mail on April 19, 2011.

s/Tracy A. Jacobs
TRACY A. JACOBS